

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK CURTIS LOUDE, JR.,

Defendant-Appellant.

UNPUBLISHED

October 18, 2005

No. 255724

Wayne Circuit Court

LC No. 03-012445-01

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of armed robbery, MCL 750.529. We affirm.

The first issue on appeal is whether the trial court erred in limiting defendant's cross-examination of the victim regarding the validity of his work authorization papers and his immigration status. Defendant contends that the trial court violated his constitutional right to confrontation, which presents a question of law that this Court reviews de novo. See *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

The Sixth Amendment Confrontation Clause does not confer on a defendant an unlimited right to cross-examine on any subject. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). "Cross-examination may be denied with respect to collateral matters bearing only on general credibility." *Canter, supra*. The matters defendant wished to explore in this case were collateral and only generally bore on the victim's credibility.

The key issue in this case was identification. Defendant exercised his right to cross-examine the victim about what he saw, how he perceived it, and how he was so certain that defendant was the gunman who robbed him. The only link between the victim's expired work authorization papers and his subsequent immigration status is that he contended the papers were not expired and were in his stolen wallet. His illegal immigration status was discovered when he reported the lost papers to immigration authorities months after the robbery. Otherwise, these matters had nothing to do with the robbery and only concerned the victim's general credibility.

Defendant's trial strategy admitted as much, as his theory of the case was not that the victim lied about the whole robbery, but that his identification was wrong. Defendant challenged inconsistencies in the details of the victim's accounts of the crime. Defendant presented five

alibi witnesses. The jury considered and rejected that defense and it is not this Court's place to second-guess that determination. See, e.g., *People v Lemmon*, 456 Mich 625, 636-637; 576 NW2d 129 (1998) (stating that division of functions between court and jury "needs no citation of authority" and that "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses").

Furthermore, any such error was harmless beyond a reasonable doubt because it had no effect on the verdict. See *People v Solomon*, 220 Mich App 527, 526-537; 560 NW2d 651 (1996). Given the strength of the victim's identification testimony and the jury's rejection of the testimony of defendant's alibi witnesses, it is clear that he would have been convicted even if the jury heard more testimony about the victim's work papers and immigration status.

Defendant next argues that his conviction was against the great weight of the evidence and that the trial court erred when it denied his motion for a new trial. After review for an abuse of discretion, we disagree. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Defendant's motion was premised on the witness credibility contest. New trial motions based solely on the weight of the evidence regarding witness credibility are not favored. *Lemmon*, *supra* at 639, citing *US v Thomas*, 894 F Supp 58, 63 (NDNY, 1995). While consideration of a motion for a new trial necessarily implicates the credibility of witnesses, *Lemmon*, *supra* at 638, our Supreme Court expressed a great reluctance to base a new trial solely on credibility and limited it to exceptional cases. Examples of such cases include when testimony contradicts indisputable physical facts or laws, is patently incredible or defies physical realities, is material and so implausible that no reasonable juror could believe it, or is seriously impeached and the case is marked by uncertainties and discrepancies. *Id.* at 643-644 (citations omitted).

No exceptional circumstances exist in this case. Defendant has not argued that the testimony against him was patently incredible or so implausible that no reasonable juror could believe it. The jury was simply asked to decide between the identification testimony of the victim and defendant's alibi defense witness testimony. The victim testified that he saw defendant face-to-face in the light of day while close enough to reach out and touch him. Though defendant was part of a group, he was the sole gunman and for that reason the victim focused on him out of fear, to the point that he urinated during the robbery. The trial court described his testimony, which the jury heard live, as "positive" and "adamant." Jurors are in a unique position to evaluate credibility by cues such as tonal quality, volume, speech patterns, and demeanor. *Id.* at 646. The victim identified defendant's photograph a few days after the robbery and described his level of confidence as one hundred percent. He testified that he would not forget defendant's face for a century. In believing this testimony, the jury had ample basis for defendant's guilty verdict. "[A] judge may not repudiate a jury verdict on the ground that he disbelieves the testimony of witnesses for the prevailing party." *Id.* at 636. A judge is not to sit as a thirteenth juror. *Id.* at 645.

Defendant's impeachment of the testimony only affected some of its particulars and not its general thrust, which was adverse to defendant. Nothing in the record seriously impeached the victim's claim that he had a plain view of defendant, that he was in close proximity to him, and that it was daylight. Instead, defendant's alibi witnesses, who were for the most part his

close relations, merely asked the jury to believe them instead. “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *Id.* at 647.

Furthermore, defendant’s alibi testimony was not overwhelming. None of it necessarily demonstrated that he had no opportunity to commit the crime or that it was otherwise physically impossible. Even if the alibi testimony could have led a reasonable jury to acquit, a grant of a new trial is not compelled. “If the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions, the judge may not disturb the jury findings although his judgment might incline him the other way.” *Id.* at 644 (quotation, citation omitted). Accordingly, the trial court did not abuse its discretion in denying defendant’s motion for a new trial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra